IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 546

CITY OF MERIDIAN,
Defendant-Appellant,

vs.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, *Plaintiff-Appellee.*

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION OF APPELLEE TO DISMISS AND/OR AFFIRM, AND BRIEF IN SUPPORT THEREOF

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Appellee herein moves the Court:

(1) To dismiss the appeal filed by appellant pursuant to 28 U.S.C., Sec. 1254 (2), for the reason that both the District Court and the Court of Appeals held that the state statute upon which appellant relies was repugnant not only to the Federal Constitution but the Constitution of Mississippi as well. Hence, regardless of this Court's determination of the Federal constitutional question, the result reached below will not be changed.

(2) In the alternative, to affirm the judgment of the Court of Appeals on the ground that the questions raised in appellant's Statement as to Jurisdiction are so unsubstantial as not to require further argument.

STATEMENT OF THE CASE

This cause was commenced by the filing by plaintiff-appellee of a suit for a declaratory judgment in the United States District Court for the Southern District of Mississippi, attacking the constitutionality of Section 5 (e), Chapter 372, Mississippi Laws of 1956, insofar as said section required appellee to pay 2% of its gross receipts to appellant as compensation for the privilege of occupying the streets of the City of Meridian with its telephone lines. The complaint alleged that the requirement of the act that appellee pay compensation to Meridian for the use of its streets was repugnant to Article I, Section 10 of and the Fourteenth Amendment to the United States Constitution and Article 3, Section 16 of the Mississippi Constitution[1] (R. 11).

The 2% charge is admittedly not a tax, but a charge in the nature of rental. The taxing and police powers of the state or city are not involved.

All the facts in the case were stipulated before the District Court, and the case was heard by the court without a jury. The stipulated facts show that following the passage of Chapter 38 of the Mississippi Laws of 1886[2], the appellee or its predecessors continuously and from year to year extended and enlarged their facilities and their use and occupancy of the streets of Meridian, as well as other highways and streets throughout the State of Mississippi

1. "*Ex post facto* laws, or laws impairing the obligation of contracts, shall not be passed." *Mississippi Constitution, 1890.*

2. This act is set out in full on page 28 of the Appendix to Appellant's Statement as to Jurisdiction. In short, it authorized all telephone companies to occupy the streets and highways of the state with their facilities and contained no provision whatever for any compensation to be paid to municipalities or the state.

(R. 34; 36; 41; 238-240). It was and is now the contention of appellee that such construction, expansion and extension of telephone lines on the streets of Meridian and other streets and highways constituted an acceptance of the offer contained in the 1886 Act, and that such acceptance created a contract between the State of Mississippi and the telephone company, which is fully protected from impairment by both the Federal and State Constitutions. The contentions and argument of appellee as to the creation of a contract are summarized in the opinion of the Court of Appeals (256 F. 2d 83, 87):

> " 'The following propositions of law, which were sustained by the lower court, have been firmly established by judicial decisions of the United States Supreme Court, other federal courts, and state courts:
>
> " '(1) The Legislature of Mississippi in 1886 had plenary control over all highways and streets of the state, whether within or without municipalities, and the Act of 1886 was an offer to telephone and telegraph companies of the right to make use of all such highways and streets for the purpose of providing the citizens of this state with telephone service. This right was granted without any requirement of paying compensation to either municipalities or the state. The companies were already operating in the state, obviously on a small scale—the industry was in its infancy—the legislature wanted the industry to expand —note the title to the Act, page 8, supra.
>
> " '(2) That the continued maintenance of poles and lines and other facilities after 1886, as well as the continued construction, expansion, and extension of such lines on the public streets of Meridian and other streets and highways throughout the State of Mississippi constituted an acceptance by the telephone company and its predecessors of the offer of the right to

use all streets and highways which was contained in the 1886 Act.

"'(3) That these acts of acceptance resulted in the creation of a perpetual and irrevocable contract between the Telephone Company, on the one hand, and the State of Mississippi, on the other, which contract right is protected from impairment by the provisions contained in both the Federal and State Constitutions prohibiting the impairment of the obligation of contracts.

"'(4) The imposition upon appellee of an obligation to pay two percent of its monthly service charges as compensation for the use of the streets of Meridian constitutes an unlawful attempt to violate the obligations of a contract which was created and has been in existence for more than seventy years, and is therefore violative of the constitutional prohibitions. It would place an additional burden on the vested rights of the plaintiff.

"'The various arguments advanced by appellant in its brief were argued at great length to the district court. The court, after giving consideration to all these contentions, and after reviewing the circumstances and conditions which existed at the time of the passage of the 1886 Act, concluded that the Act extended an invitation and offer which, when accepted, resulted in a contract which is protected not only by the Federal Constitution *but by the State Constitution of Mississippi as well.*'" (Emphasis supplied).

The District Court granted the relief sought by appellee and entered the judgment which is set out in full in the opinion of the Court of Appeals (256 F. 2d at 85). It appears in the record at pp. 252-253. As will be seen from paragraph No. 3 of this judgment, the District Court specifically held that the Mississippi Act of 1956, insofar as it required compensation to be paid to appellant City, was

"in conflict with the Constitution of the State of Mississippi and the Constitution of the United States." On appeal the Court of Appeals affirmed the District Court (R. 284), and stated in its opinion (256 F. 2d at 87):

> "Upon a careful examination of the briefs and arguments in the light of the record made below, we find that they present nothing for our consideration that was not presented to, and considered by, the district judge, with whose judgment and with the reasons given for it in his thoughtful and thorough opinion, we find ourselves in full agreement. * * *"

ARGUMENT

I.

This Case Is Not Reviewable by Appeal

The appellant has asked this Court to review by appeal, under 28 U.S.C., Sec. 1254 (2), the judgment of the Court of Appeals, even though that judgment rests as much on a State constitutional ground as on a Federal constitutional ground.

Section 1254 (2) is narrowly drawn and provides for review by appeal in a very limited class of cases. We respectfully submit that appellant should have sought review by certiorari. The portion of Section 1254 (2) providing for "appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution * * * of the United States," must be read in the light of the further provision in Section 1254 (2) that the "review on appeal shall be restricted to the Federal questions presented."

When so read it seems obvious that Congress intended to provide for appeal *only* in those cases where a state

statute is held by a court of appeals to be invalid *solely* because of a conflict with the Federal Constitution, treaties or laws.

Even if this Court should pass on the Federal question, its decision would only be an academic discussion which would not change the result of the litigation, since the terms of Section 1254 (2) prevent review of the State constitutional question.

While we know of no case ruling squarely on the point we raise here, we believe that *United States* v. *Hastings*, 296 U.S. 188, 193, 80 L. Ed. 148, 150, 151, 56 S. Ct. 218 (1935) and cases therein cited, support our position by analogy and in principle.

None of the cases cited by appellant in support of jurisdiction (p. 4 of Statement as to Jurisdiction) is in point. In fact only the *City of Chicago*, *City of Detroit*, and *Watson* cases involved appeals prosecuted under Sec. 1254 (2), and in each of those cases the Court of Appeals had held state statutes invalid *only* because of conflict with the Federal Constitution. No State constitutional provision was raised or passed upon.

Appellant contends that the "Questions Presented," as stated by it, all arise under the Federal Constitution. As shown, appellant ignores the fact that in the present case the State statute was held to be in violation of *Article 3, Section 16* of the Mississippi Constitution, as well as the Federal Constitution.

For the foregoing reasons, it is submitted that the appeal should be dismissed.

II.

The Decision Below Is Clearly Correct

The two courts below have applied principles long established by this Court and followed by an unbroken line of Federal and State court decisions. In fact, both decisions are an adherence to this Court's decision in the case of *Russell* v. *Sebastian*, 233 U.S. 195, 58 L. Ed. 912, 34 S. Ct. 517 (1914), and prior cases cited in that decision.

If there was ever any doubt about the proposition, it was settled by the *Sebastian* case that, whether granted by a state constitutional provision, a municipal ordinance, or a legislative act, authority granted to a utility to use public streets in furtherance of its public service, ripens into a contract protected from impairment, when acted upon by the construction, extension and expansion of utility facilities on such streets. This Court has said that the plainest principles of justice and right support the rule.

Among other considerations which this Court has held support the rule are the state's interest in obtaining comprehensive and efficient utility services; the public and permanent nature of the businesses such companies conduct; and the substantial investment usually contemplated. See *City of Louisville* v. *Cumberland Telephone and Telegraph Company*, 224 U.S. 649, 56 L. Ed. 934, 32 S. Ct. 532 (1912); *Owensboro* v. *Cumberland Telephone and Telegraph Co.*, 230 U.S. 58, 57 L. Ed. 1389, 33 S. Ct. 988 (1913).

Where a state has entered into a contract with a utility conferring the right to use public streets and highways without the payment of compensation, it is not within the power of the state later to require the payment of compensation. Certainly, the right to do an act free of charge

is impaired, if not entirely destroyed, by a requirement that a charge be paid.

In addition to the *Sebastian*, *Louisville*, and *Owensboro* cases, the following additional authorities demonstrate the correctness of the decision below:

City of Walla Walla v. *Walla Walla Water Co.*, 172 U.S. 1, 43 L. Ed. 341, 19 S. Ct. 77 (1898);

Boise, etc., Water Co. v. *Boise City*, 230 U.S. 84, 57 L. Ed. 1400, 33 S. Ct. 997 (1913);

Grand Trunk, etc., Company v. *South Bend*, 227 U.S. 544, 57 L. Ed. 633, 33 S. Ct. 303 (1913);

New Orleans Gas Light Company v. *Louisiana Light, etc., Co.*, 115 U.S. 650, 29 L. Ed. 516, 6 S. Ct. 252 (1885);

New York Electric Lines Co. v. *Empire City Subway Company*, 235 U.S. 179, 59 L. Ed. 184, 35 S. Ct. 72 (1914);

Ohio Public Service Company v. *State of Ohio*, 274 U.S. 12, 71 L. Ed. 898, 47 S. Ct. 480 (1927);

Southern Bell Telephone and Telegraph Company v. *City of Mobile*, 162 Fed. 523 (C. C. Ala. 1907), affirmed 174 Fed. 1020 (C. A. 5 1909);

Phenix City v. *Southern Bell Telephone and Telegraph Co.*, 33 F. Supp. 283 (M. D. Ala. 1940);

Pacific Telephone and Telegraph Company v. *City of Los Angeles*, 44 Cal. 2d 272, 282 P. 2d 36 (1955);

City of Petaluma v. *The Pacific Telephone and Telegraph Company*, 44 Cal. 2d 284, 282 P. 2d 43 (1955);

Los Angeles County v. *Southern California Telephone Company*, 32 Cal. 2d 378, 196 P. 2d 773 (1948), appeal dismissed 336 U.S. 929, 93 L. Ed. 1090, 69 S. Ct. 737 (1949);

Postal Telegraph-Cable Company v. *Railroad Commission of California*, 200 Cal. 463, 254 Pac. 258 (1927);

City of Seattle v. *Western Union Telegraph Company*, 21 Wash. 2d 838, 153 P. 2d 859 (1945);

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Traverse City v. *Consumers Power Company*, 340 Mich. 85, 64 N.W. 2d 894 (1954);

City of Lansing v. *Michigan Power Co.*, 183 Mich. 400, 150 N.W. 250 (1914);

Mayor and Council of Crisfield v. *Public Service Commission*, 183 Md. 179, 36 A. 2d 705 (1944);

People v. *Deehan*, 153 N.Y. 528, 47 N.E. 787 (1897).

Appellant asserts (Statement as to Jurisdiction, p. 18) that the opinions below directly conflict with earlier decisions of this Court in *St. Louis* v. *Western Union Telegraph Company*, 149 U.S. 465, 37 L. Ed. 810, 13 S. Ct. 990 (1893) and *Bankers Trust Company* v. *Raton*, 258 U.S. 328, 66 L. Ed. 642, 42 S. Ct. 340 (1922) as well as with the decision of the Court of Appeals for the Sixth Circuit in *Memphis* v. *Postal Telegraph Cable Company*, 145 Fed. 602 (1906). There are vast differences between the *Raton* case, the *Postal Telegraph* case and the present case.

Any apparent conflicts between language used in the *St. Louis* case and the opinions of the courts below have been eliminated by decisions of this Court rendered subsequent to the *St. Louis* case.

In the *Raton* case a water company, incorporated for the express purpose of furnishing water to the people of the City of Raton, made a contract with the City to supply it with water for a period of 25 years. This period expired, and an injunction was sought to prevent the City from ousting the company from the use of the City's streets. The water company contended that a New Mexico act of 1887 granted it the right to use City streets free of interference. The City, on the other hand, argued that the 1887 Act was not intended to repeal an earlier 1884 Act which authorized the City to erect water works

or to grant private individuals such power for a term not exceeding 25 years. The Supreme Court of New Mexico had earlier held that the water company's franchise was granted by the City. Under these facts, this Court held that the company was estopped from claiming that its rights did not spring from the contract made pursuant to the terms of the 1884 Act. This is a far different case from the present case. The Mississippi Supreme Court, in *Hodges* v. *Western Union Tel. Co.*, 72 Miss. 910, 914, 18 So. 84 (1895), said:

> "* * * Without this act [the same 1886 Act on which appellee relies in the present case] the appellee could not have entered upon the streets of the City of Meridian for the purpose of constructing and maintaining its telegraph lines; and under it, it could only have so entered and occupied its streets, with its poles, by virtue of the right of eminent domain, upon due compensation first made, had not the terms of the act clearly shown that such compensation was dispensed with. * * *"

In the light of this pronouncement by the Mississippi Court, there can be no doubt as to the source of the present appellee's right to use the streets of Meridian.

It is clear that both lower courts considered the appellant's contention that appellee was estopped from claiming rights under the 1886 Act, and found it to be without substance. (See opinions of the Court of Appeals and the District Court at pp. 9, 11-12, and pp. 23-27, respectively, of appellant's Appendix to Statement As to Jurisdiction).

Memphis v. *Postal Telegraph Cable Company*, 145 Fed. 602 (6th Cir. 1906), has no conceivable application here. The distinction made by the Fifth Circuit in the present case is sound. Furthermore, the Tennessee statute involved in the *Memphis* case had never been construed by the

Tennessee Supreme Court. The Federal Court felt that the particular Tennessee statute there involved did not authorize the use of municipal streets without a charge. That holding is directly contrary to the Mississippi Supreme Court's interpretation of the Mississippi Act of 1886.[3] Since the Federal Court there construed the Tennessee statute as not having authorized the use of the streets free of charge in the first place, the appellate court was not called upon to and did not pass upon the question involved in the present case.

The language in *St. Louis* v. *Western Union Telegraph Co.*, 149 U.S. 465, 470, 37 L. Ed. 810, 814, 13 S. Ct. 990 (1893), which appellant says is in conflict with the holding below, is (149 U.S. at 470):

> "* * * It is true that, prior to that time, and by the Act of November 17, 1855 (2 Mo. Rev. Stat. 1855, p. 1520), the right was given to every telegraph corporation to construct its lines along the highways and public roads; but that was superseded by the legislation of 1866; and when in force it was only a permission, a license, which might be revoked at any time; and, further, whatever rights, if any, this defendant may have acquired to continue the use of the streets already occupied at the time of the revision of 1866, it cannot with any show of reason be contended that it received an irrevocable power to traverse the state and occupy any other streets and highways."

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3. "* * * No compensation was provided for cities, in case their streets should be used, but the use and occupation of so much of the streets of cities as may be reasonably needed for the construction and maintenance of telegraph poles and telegraph lines *is expressly authorized without compensation* to the state or to the cities, municipal subdivisions of the state. * * *" *Hodges* v. *Western Union Tel. Co.*, 72 Miss. at 913-914, 18 So. at 84 (Emphasis supplied).

It is clear that the language in the *St. Louis* case which is relied upon by appellant has been discredited as a statement of principle, and has lost any weight as authority by reason of many subsequent decisions of this Court (See cases listed p. 8, *supra*). The fact is that in decision after decision, rendered subsequent thereto, this Court and many other courts, have clearly, unmistakably and repeatedly announced the rule that state grants to utilities inviting them to use streets and highways with their facilities are not mere revocable permits but constitute offers which, when accepted as here, result in irrevocable contracts and property rights

The courts below have adhered to the principles laid down in *Russell* v. *Sebastian*. In *Sebastian*, this Court reversed the California Supreme Court. The California Supreme Court had relied upon the decision in the *St. Louis* case and held that the utility's rights were confined to the streets occupied prior to the revision of the state grant. *Ex parte Russell*, 163 Cal. 668, 126 Pac. 875, 879 (1912). When the *Sebastian* case reached this Court, counsel for the City again relied upon the language from the *St. Louis* decision which the appellant has here seized upon.[4]

In *Sebastian* the Court emphatically rejected the identical contention which appellant is here trying to make.

The decision in *Russell* v. *Sebastian* held:

> (1) That the grant, resulting from the acceptance of the state's offer, constituted a protected contract and property right, and not a mere revocable license: and
>
> (2) That the scope of the grant is not to be measured by the use and occupancy of streets at any given time, but rather by the breadth of undertaking invited and encouraged by the grant.

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4. See summary of City's brief at pages 917-918 of 58 L. Ed.

Since the decision in the *Sebastian* case, this Court has consistently applied the principles announced therein. Since the decision in the *Sebastian* case there is no decision of any court contrary to the decision of the Court of Appeals in the present case.

The contention of appellant (Page 7, Statement as to Jurisdiction), that Chapter 38, Mississippi Laws of 1886 is itself violative of the equal protection clause of the Fourteenth Amendment is plainly unsubstantial. See *Los Angeles County* v. *Southern California Telephone Company*, 32 Cal. 2d 378, 196 P. 2d 773 (1948), appeal dismissed for want of a substantial federal question, 336 U.S. 929, 93 L. Ed. 1090, 69 S. Ct. 737 (1949).

CONCLUSION

We respectfully submit that the appeal should be dismissed, or in the alternative, that the case should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Charles B. Snow, attorney of record for appellee, hereby certify that I have this day mailed to Honorable Thomas Y. Minniece and Honorable Lester E. Wills, attorneys for appellant, both of Meridian, Mississippi, a true and correct copy of the above brief.

This ..... day of December, 1958.

.....

CHARLES B. SNOW.